No. 21949

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

---

RESPONDENT'S BRIEF

O'MELVENY & MYERS
CHARLES G. BAKALY, JR.
PETER M. ANDERSON
STANLEY H. WILLIAMS
433 South Spring Street
Los Angeles, California
Attorneys for Respondent

FILED
APR 3 1968
WM. B. LUCK, CLERK

Jeffries Banknote Company, Los Angeles — 746-1611

TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

Cases

Page

Page

Statutes

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTH BAY DAILY BREEZE, a Division of Southern California Associated Newspapers, Inc.

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

---

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Preliminary Statement

This is a proceeding, pursuant to Section 10(e) of the National Labor Relations Act, as amended (referred to herein as "Act") in which the National Labor Relations Board (referred to herein as "Board") is seeking to enforce an order against the South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc. (referred to herein as "Respondent"), issued on October 12, 1966, and reported at 160 NLRB No. 145. (R. 143-144.)*

---

* References to the pleadings filed with the Court as Volume I, Pleadings, are designated "R". References to the stenographic transcript of the hearing in the representation case (31-RC-18) filed with the Court as Volumes II, III, and IV, are designated "RC Tr." References to the stenographic transcript of the unfair labor practice hearing (31-CA-119), filed with the Court as Volumes VI-XVI, are designated "Tr". References to exhibits of the General Counsel, Respondent, and the Trial Examiner are designated "GC Exh.", "R Exh." and "Tr. Exam. Exh." respectively.

The Board found that the Respondent had violated Sections 8(a)(1) and 8(a)(5) of the Act and had engaged in conduct affecting the results of a representation election held on July 20, 1965, in which Respondent's Editorial Department employees elected not to be represented by the petitioning union, Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC (referred to herein as "Guild"). The Board's order, *inter alia,* set aside the election and directed Respondent to cease and desist from engaging in certain unfair labor practices and to bargain with the Guild upon request.

That portion of the Board's order which requires Respondent to bargain with the Guild is premised upon the conclusion that at the time the Guild requested recognition, the Guild represented in an appropriate unit a majority of Respondent's editorial employees. Indeed, the Board has admitted that it does not have the power to issue a bargaining order unless the union involved did represent a majority of the employer's employees. See, *e.g., J. P. Stevens & Co., Inc.,* 157 NLRB 869 (1966). In concluding that this requirement was met, the Board relies on its conclusion that 14 of Respondent's editorial employees signed valid union authorization cards and that the appropriate unit consisted of 25 employees.

Respondent, however, contends that the Board's bargaining order cannot be enforced in that the Guild did not represent a majority of Respondent's editorial employees in an appropriate unit. Respondent will demonstrate herein that at least six of its editorial employees signed union authorization cards under circumstances which require the court to disregard such cards as evidence of the employees' desire to be represented by the Guild in collective bargaining and that the appropriate bargaining unit consisted of 28 employees.

Respondent also contends that the instant case should be remanded on two crucial grounds. First, the Board should have required its General Counsel to show Respondent's counsel any written statements in his possession which were signed by employees whose authorization cards were introduced into evidence and which related to the circumstances surounding the execution of such cards. Second, the Trial Examiner erroneously admitted into evidence a highly prejudicial document identified as General Counsel's Exhibit No. 18 which was stolen by an employee for use by the Guild and the General Counsel. Respondent does not believe that the Board's findings of certain unfair labor practices in violation of Section 8(a)(1) of the Act are supported by substantial evidence, but because the Trial Examiner's whole view of this case was so colored by General Counsel's Exhibit No. 18, it is submitted that instead of taking the time of this Court to review such findings and the record at this time, the interests of justice will best be served by remanding the Section 8(a)(1) allegations of the complaint to the Board for a hearing before another Trial Examiner whose views would not be colored by General Counsel's Exhibit No. 18.

Statement of Facts

Respondent is engaged in the publication and distribution of a daily newspaper and several weekly newspapers at its plant in Torrance, California. (R. 68; Tr. pp. 778-780.) For many years Respondent has had collective bargaining relationships with the International Typographical Union, the International Stereotyper's and Electrotyper's Union of North America, and the International Printing Pressmen and Assistant's Union of North America. (Tr. p. 790.) During this period there has never been a strike or serious labor dispute involving Respondent's employees. (Tr. p. 791.)

In 1962 the Guild attempted to organize the circulation employees of Respondent and claimed to represent a majority. Following a campaign, a majority of employees declined to select the Guild as their collective bargaining representative and the results of the election were certified. (R. 69-70; Tr. p. 792.)

In 1965 the Guild conducted a campaign to organize Respondent's editorial employees. (R. 68.) At a meeting on Friday, April 23, 1965, attended by the Guild's international representative Loel Schrader and three of Respondent's editorial employees, Gary Gillis, Floyd Rinehart and Alvin Butkus, it was decided to conduct an immediate card solicitation effort with the objective of obtaining a sufficient number of signed cards so that a petition for an election could be filed with the Board the following Monday. (R. 68; Tr. pp. 51, 104-105.)

Contrary to the allegation on page 3 of the Board's brief, the Trial Examiner did not credit Schrader's testimony that at this meeting he explained that it was possible to get recognition *without an election,* nor that the Guild would want 70 per cent of the employees signed up before it would seek recognition *without an election.* (R. 68, lines 52-57; R. 80, lines 32-40; Tr. pp. 697-699, 702-704, 707.) Instead, the Trial Examiner credited Rinehart's testimony that he did not recall any discussion about the possibility of the company agreeing to Guild recognition without an election and that Schrader told Rinehart that the cards indicated the employees were interested in the Guild and that they wanted an election. (R. 68, lines 52-57; Tr. p. 698.)

The Trial Examiner found that Gillis and Rinehart were key solicitors of authorization cards on behalf of the Guild. (R. 68.) They solicited cards from employees over the weekend of April 24-25 and by Sunday evening, April 25, a total of 15 cards had been obtained. (R. 69.)

On April 26 at 10:20 A.M., Respondent received a telegram from Schrader requesting recognition and, alternatively, advising Respondent that the Guild would insist on a secret ballot election conducted by the Board so that all employees could vote in accordance with their free consciences without fear of retaliation from either party. The telegram did not claim that the Guild represented a majority of Respondent's editorial employees, but simply stated that "[e]ditorial dept. employees" had designated the Guild as their representative. (R. 69.) At 1:29 P.M. the same day Schrader filed the petition in Case No. 31-RC-18. (R. 69; Tr. p. 60.)

On April 27, Respondent's publisher Robert Curry responded to Schrader's telegram advising him of his doubt as to the Guild's representative status and suggesting that a Board election was the appropriate way to resolve these questions. (R. 69.)

At a hearing conducted by the Board on the Guild's petition, the principal issue in dispute was the supervisory status of news editor Ken Johnson, city editor Steven Berman, assistant news editor Gary Palmer, sports editor Richard White, woman's editor Pat McDonald, and chief photographer Robert Moore. The Guild contended that all these employees were supervisors and Respondent contended that none of them were supervisors. The Regional Director determined that Johnson, Berman and Palmer were supervisors and the other three employees were not supervisors. (R. 8-9.)

An election was conducted which resulted in a tie vote. (R. 13.) Thereafter, the Guild filed objections to the conduct of the election and an unfair labor practice charge. These proceedings were consolidated for decision by the Trial Examiner and the Board. (R. 31.)

Substantial testimony at the hearing was directed to the question as to whether the Guild did in fact represent a majority of Respondent's editorial employees at any relevant time. As will be shown in detail in the argument herein, it is Respondent's position that the Guild did not have a majority since at least six of the 15 cards were invalid because the signers were led to believe by authorized representatives of the Guild that the cards would be used only to obtain an election. The Board affirmed the Trial Examiner's ruling rejecting one of the cards as a designation of the Guild as bargaining representative, but sustained the validity of the remaining 14. Respondent also contended throughout the proceeding that the appropriate bargaining unit should have consisted of 28 employees, rather than 25, with Johnson, Berman and Palmer being included in the unit as non-supervisory employees.

Questions Presented

1. Should authorization cards be deemed valid proof that a Union has been designated as the bargaining representative of employees where the signers of the cards were led to believe that the cards would be used only to obtain an election?

2. Were certain individuals improperly excluded from the bargaining unit used by the Board in determining whether the Guild represented a majority of the employees?

3. If the Board's General Counsel introduces authorization cards signed by employees as evidence of the Union's majority status, is the Employer's counsel entitled to examine any statements by such employees which are in the General Counsel's possession and which relate to the circumstances under which the cards were signed?

4. Did the Board err in permitting the introduction into evidence of a document stolen by an employee for use by the Charging Party and the General Counsel?

ARGUMENT

I. THE BOARD ERRED IN CONCLUDING THAT THE GUILD REPRESENTED A MAJORITY OF RESPONDENT'S EDITORIAL EMPLOYEES.

A. The Board Applied an Incorrect Standard in Determining the Validity of the Authorization Cards.

That portion of the Board's order requiring Respondent to bargain with the Guild upon request is premised upon the conclusion by the Trial Examiner, affirmed by the Board, that a majority of the editorial employees had designated the Guild as their bargaining representative at the time of the demand for recognition. In support of the claim of majority status, the General Counsel introduced 15 authorization cards into evidence. Respondent challenged the validity of the cards of Marx Ceder, Charles Cole, Donald Erickson, Floyd Rinehart, Richard Baylor, Randolph Gray and Robert Peterson on the ground that the cards were signed because these employees were led to believe by statements made by authorized representatives of the Guild that the cards would be used only for the purpose of obtaining an election. Respondent thus argued that these cards could not be construed as proof that these employees affirmatively desired to be represented by the Guild.

In determining the validity of the challenged authorization cards, the Trial Examiner observed that "evidence to vary the written and unequivocal designations by the employees on an authorization card is strictly construed and the Board has held that representations that the card is

'to get an election' is [sic] not a false representation or a misstatement of fact, but that a representation that the card is 'only for an election' is a misstatement of fact." (R. 82.) He thus adopted the Board's "only" rule which holds that an authorization card will not be invalidated on the grounds of a material misrepresentation unless the signer has been *expressly* told that the "sole" or "only" purpose of the card is to obtain an election. Under the rationale of this rule, the written language on the card authorizing the union to be the bargaining representative is not vitiated unless such words are used.

Applying this rule, the Trial Examiner found that such material misrepresentations had been made to two employees, Ceder and Cole. Accordingly, he rejected Ceder's card and its rejection is not in issue before this Court. (R. 83.) The Trial Examiner, however, did not reject Cole's card in spite of the misrepresentation because he found that Cole would have signed a card in any event. (R. 83.) He further found that the misrepresentations made to Erickson, Rinehart, Baylor, Gray and Peterson were not sufficiently material to warrant the rejection of their cards. The Trial Examiner's findings and conclusions were upheld by the Board.

It is the position of Respondent in this Court that the Board erred in upholding the validity of the cards of Cole, Erickson, Rinehart, Baylor and Gray. Not only did the Board and the Trial Examiner use an incorrect standard, but, as will be discussed in a later section, the conclusions reached with respect to Cole and Erickson were erroneous even if the Board's standard were applied.

It should first be noted that authorization cards are unreliable indications of employees' desires even when such cards have not been procured through the use of mislead-

ing statements. For example, the Fourth Circuit has recently indicated that it will not even consider authorization cards as evidence of majority status. It is submitted that the following remarks by the court in *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967) demonstrate the danger inherent in using authorization cards as conclusive proof of employees' desires.

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCullock presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater the likelihood of a union election victory, but, obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

"The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

". . . .

"The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

"For such reasons, a card check is not a reliable indication of the employees' wishes." (386 F.2d at 565, 566.) (Footnotes omitted.)

The inherent unreliability of authorization cards is further increased when a card solicitor asks employees to sign authorization cards on the representation that the cards will be used to obtain an election. It is a fact of life that employees are often led to believe that the sole purpose of an authorization card is to obtain an election even if the words "sole" or "only" are not used. Such an impression may be created by the solicitor simply by stressing the need for an election and omitting mention of any other purpose. Contrary to the contentions of the Board, even employees who are college graduates can be so misled. This is especially true when one's signature is solicited by a friend, who also has a college education, who seems more knowledgeable in union affairs, and who states the cards will be used for a limited purpose. Thus, the Board's legalistic rule that there is a valid authorization by an employee unless the words "sole" or "only" have been uttered flies in the face of reality. It is therefore not surprising that this rule, applied by the Board in the instant case, has been rejected by the vast majority of courts of appeals.

For example, the Board's "only" rule was squarely rejected by the Second Circuit in *NLRB v. S.E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1967). In that case, the Board refused to invalidate certain cards where the employees had been told that the cards would be used for an election but had *not* been told that an election was the sole purpose of the cards. Rejecting the cards, the court stated:

> "The Board makes much of the supposed clarity of the cards used by the Union in this case, in contrast to the deceptive or ambiguous ones in other instances where it nevertheless upheld the union. [Citations omitted.] But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is

not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. The very argument by which the Board has upheld unions even when the cards were deceptively worded, namely, of placing 'more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards,' NLRB v. Winn-Dixie Stores, Inc., supra, 341 F.2d at 754, works against it here. In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." (380 F.2d at 442-433.) (Footnote omitted.)

The court then distinguished its earlier decision in *NLRB v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966) on the grounds that the employees in the *Gotham* case had been affirmatively told that the cards would be used to request recognition from the employer. Referring to the present case, the court stated:

"It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the

cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth. As has been well said, Note, supra, 75 Yale L.J. at 826:

'If the employee thinks the cards will lead to a secret ballot, he can insure himself against the possibility of future retaliation and prevent harassment only by signing. Such an employee may sign a card planning to vote against the union or at least intending to reserve decision until he hears the employer's views or talks to fellow employees.'

We decline to encourage such an impairment of employees' § 7 rights." (380 F.2d at 445.) (Footnotes omitted.)

The *Nichols* decision has subsequently had a persuasive influence on other courts. The Sixth Circuit's decisions in *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir. 1965) and *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965) have frequently been cited by the Board as judicial approval of its "only" rule. However, in *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967) the Sixth Circuit, relying on the *Nichols* case, expressly disavowed the "only" rule. In refusing to enforce a bargaining order, the court stated:

"We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'this card is for the *sole* and *only* purpose of having an election' will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of

the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election,* an invalidation of such card does not offend our *Cumberland* rule.

". . . .

"It appears that the examiner's position was, and the Board's position now is, that unless the solicitor has actually employed the words 'sole' or 'only' in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any such mechanical interpretation. The 'outright misrepresentation' referred to therein could certainly be accomplished by other words than 'sole' or 'only'. A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words* — 'sole' and 'only' — employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed up for." (384 F.2d at 618, 620.)

The Seventh Circuit has also retreated from its previous approval of the "only" rule. In *NLRB v. Dan Howard Mfg. Co.,* .... F.2d ...., 67 LRRM 2278 (7th Cir. 1968), it stated:

"In the recent case of NLRB v. Swan Super Cleaners, No. 16952, 66 LRRM 2386 (October 25, 1967), the Sixth Circuit, through Judge O'Sullivan, explained its decision in Cumberland expressly disavowing the view that Cumberland held that the very word 'sole' or 'only' was needed to invalidate a card. The court adhered to Cumberland, saying that its rule is not offended by invalidating cards, no

matter what style or wording was used by the organizer 'if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election.' The court pointed out that it is relevant to consider the subjective intention of the signer and his expressed state of mind in deciding whether a misapprehension was knowingly induced.

"We apply the restatement in Swan of the Cumberland rule and hold that 'in its total context' the only reasonable inference that can be drawn from the Weiner-Burdette colloquy, as testified to by her, is that statements made by Weiner created in Burdette's mind a misapprenhension as to what signing the card meant and that her signature on the card did not represent an intention to designate the Union as her bargaining agent." (67 LRRM at 2280-2281.)

The Board's "only" rule has also received an unfavorable reception in the Eighth Circuit. In *Bauer Welding & Metal Fabricators, Inc., v. NLRB,* 358 F.2d 766 (8th Cir. 1966), the union had distributed authorization cards to the employees and had enclosed a letter stating that the cards would be used to obtain an election. Although the letter had not stated that this was the only purpose of the cards, the cards were nevertheless rejected by the court. The court stated:

"The emphasis throughout the letter is on the signing of the authorization cards, which would 'then', and not before, allow the Board to conduct an election to determine the representation question. We firmly believe the letter was designed for the purpose of, and succeeded in, creating the impression in the minds of the employees that the Union would become the bargaining agent only by winning an

election, and that the only purpose in signing the accompanying authorization card was to bring about such an election." (358 F.2d at 774.)

The position of the Fifth Circuit is much the same as that of the Second, Sixth, Seventh and Eighth. Its view was most recently expressed in *Engineers & Fabricators, Inc. v. NLRB,* 376 F.2d 482 (5th Cir. 1967). There it stated:

"The Board has the same burdens and obligations as any other litigant who takes the affirmative, and must prove its charge. NLRB v. Riverside Mfg. Co., 5 Cir., 1941, 119 F.2d 302. Therefore, the general counsel had the burden of showing that the cards authorized representation. Cf. Int'l Ladies' Garment Workers' Union v. NLRB, 1960, 108 U.S. App. D.C. 68, 280 F.2d 616, aff'd, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961). When cards are challenged because of alleged misrepresentations in their procurement, the general counsel must show that the subjective intent to authorize union representation was not vitiated by such representations. Here the Board did not apply this legal standard. Instead it contends that

'. . . documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence of a showing of coercion in their procurement or representations that "despite the purpose clearly and expressly stated on the cards themselves the cards would be used only for a different more limited purpose". Aero Corp., 149 NLRB No. 114, 57 LRRM at 1490.'

"This applies too lax a standard, and therefore the burden was not met." (376 F.2d at 487.)

The Board has now been left with scant support for its "only" rule. The First Circuit in *NLRB v. Southbridge Sheet Metal Works, Inc.,* 380 F.2d 851 (1st Cir. 1967) has expressly stated that it found it unnecessary to go "so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as the sole reason for signing." 380 F.2d at 856. In that case, a card was approved by the court where the signer had simply been told that there would be an election, but had *not* been told that the purpose of the card was to have an election. In *Furr's, Inc. v. NLRB,* 381 F.2d 562 (10th Cir. 1967), the Tenth Circuit gave lip-service to the Board's "only" rule, while at the same time questioning the validity of cards where the employees had been told that "there had to be an election first." Ironically, the Tenth Circuit cited in support of the "only" rule exclusively Second, Sixth, Seventh and Eighth Circuit cases. Every single one of these circuits has now openly rejected the "only" rule. The District of Columbia Circuit has given support to the "only" rule, but even that court has balked at the Board's mechanical application of the rule. See, *e.g., Amalgamated Clothing Workers v. NLRB,* 365 F.2d 898 (D.C. Cir. 1966).

Only the Third and Ninth Circuits have yet to comment on the "only" rule. Although the Ninth Circuit has decided "card cases," it has found it unnecessary to come to grips with the rule. In *NLRB v. Security Plating Co.,* 356 F.2d 725 (9th Cir. 1966), the court found that the meaning and import of the cards had been carefully explained to the employees. In *NLRB v. Hyde,* 339 F.2d 568 (9th Cir. 1964), the employees had been informed that the cards would be used for a card check.

In conclusion, it can be seen that the vast majority of the courts of appeals which have reviewed the "only" rule has rejected it and has rather adopted a different

and proper test. As pointed out previously, the Second Circuit in the *Nichols* case invalidated cards where "the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." In the *Swan* and *Howard* cases, cards were rejected by the Sixth and Seventh Circuits respectively where the solicitation was "clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election.*" The Eighth Circuit in *Bauer* spoke in terms of creating the impression in the minds of the employees that the only purpose of the card was to bring about an election. In short, the correct test is whether the card solicitor, irrespective of the exact words used, led the signer to believe that the only purpose of the card is to have an election. In this respect, it should be noted that the subjective intent of the signer is relevant in determining whether the signer was misled and many of the courts of appeals have expressly so held. See, *e.g., Engineers & Fabricators, Inc. v. NLRB, supra; NLRB v. Swan Super Cleaners, supra; NLRB v. Dan Howard Mfg. Co., supra.*

B. Even If the Board's Standard Is Correct, the Board's Findings of Fact Required That The Authorization Cards Signed by Cole and Erickson Should Have Been Rejected.

According to the findings of the Trial Examiner, adopted by the Board, a meeting was held on the evening of Friday, April 23, 1965, between the Guild's representative Schrader and three of Respondent's employees — Gillis, Rinehart and Butkus. At this first organizational meeting, the three employees signed authorization cards and were instructed to obtain authorizations from other employees over the weekend. This was done and two

nights later, on Sunday evening, April 25, 1965, Schrader had fifteen cards in his possession. Schrader then promptly dispatched his telegram to the Respondent. (R. 68-69.) It is submitted that the evidence as a whole with respect to this April 23, 1965 meeting, the findings of fact with respect to the statements made by the solicitors, and the telegram of the Guild stating that it would insist on an election and not stating that it represented a majority of the employees conclusively establish that the solicitation of all of the authorization cards was designed for the purpose of and succeeded in creating the impression in the minds of the employees that the Guild would become the bargaining representative only by winning an election and that the only purpose in signing the authorization cards was to bring about such an election. For this reason all authorization cards in this case should be disregarded.

In addition it will now be specifically shown that certain of the authorization cards were obtained only by misleading employees as to the purpose of the cards. In fact, the Trial Examiner himself rejected the card of Marx Ceder which was solicited by Gillis. He found that Gillis had told Marx Ceder, whose education consisted of three and one-half years of college, that the card was to bring about an election and that the authorization language on the card meant nothing. (R. 80.) Gillis also solicited cards from Cole, Erickson, and Gray.

Before considering the individual authorization cards challenged by Respondent, it should be observed that on page 33 of its brief the Board makes a blistering attack upon the credibility of the testimony of Cole, Erickson, Gray, Rinehart, and Baylor. The Board stated:

> "On the other hand, the testimony upon which the Company relies to invalidate the cards occurred nine

> months after they were signed; the employees in question were still employed by the Company; and they were not likely to have forgotten their employer's threats to blacklist Guild supporters, or other threats, promises and inducements designed to force abandonment of the Guild."

In seeking to invalidate these authorization cards the Respondent is relying primarily upon the findings of fact of the Trial Examiner. There was during the hearing considerable conflict in the testimony of the witnesses with respect to the circumstances surrounding the solicitation of these cards. Witness Gillis testified directly contrary to Cole, Erickson, Gray, and Rinehart with respect to material facts. Gillis was impeached in several respects by his own statement taken several weeks after the election. (Tr. pp. 142-145.) The Trial Examiner found the facts to be as stated by witnesses Cole, Erickson, Gray, Rinehart and Baylor. He therefore must have credited their testimony and not the testimony of Gillis. The Board adopted these findings of fact. It seems that by attacking the credibility of Cole, Erickson, Gray, Rinehart and Baylor, the Board is placed in the untenable position of attacking its own findings. This it cannot do. Moreover, it is also somewhat improper for the Board to criticize testimony because it was taken nine months after the events, while at the same time withholding from Respondent statements it took several weeks after the events. See Respondent's Argument II, page 41, et seq. Finally, it should be noted that, contrary to statements in the Board's brief, witness Rinehart was not employed by Respondent at the time of his testimony and had to be subpoenaed as a witness. (Tr. p. 694.) In addition, Cole and Baylor were also subpoenaed by the Respondent. (Tr. pp. 642, 758.)

The cards of Cole and Erickson will now be considered.

Charles Cole

The Trial Examiner made the following findings with respect to Cole which findings were adopted by the Board:

> "Gillis solicited Cole's card. After reading the printed matter on the card, Cole asked Gillis if he would be committing himself to vote for the Guild. Gillis replied, 'Forget it;' that it would not commit him to vote for the Guild or commit him to the Guild. Gillis stated that Gillis made a pretty good argument for the Guild, and when he left he was pretty well sold on what they were trying to do. Cole filled out the back side of the authorization card, indicating that he would be interested in serving on the negotiating committee for the Guild and the legislation committee, although Gillis told him it was not necessary for him to fill out this side of the card. Cole had been a member of the Guild on a prior occasion when employed by another newspaper. During part of the campaign, Cole was active on behalf of the Guild." (R. 80.)

The seriousness of the aforementioned misrepresentation by Gary Gillis is more vividly demonstrated by the exact testimony of Cole:

> "Then Gary showed me the card, and I read the card, and there was something at the top of the card that said I was — that literally said that I would be committing myself to the Guild; and I asked Gary about it, and he said to forget it.
>
> "I asked him if it would commit me to voting for the Guild, and he said, 'Forget it,' and words to the effect it wouldn't commit me to voting for the Guild or commit me to the Guild." (Tr. p. 647, lines 7-14.)

Although the Trial Examiner found that Gillis had made a misrepresentation, he refused to invalidate Cole's card primarily because of the following testimony by Cole:

> "I would say that Gary made a pretty good argument for the Guild, and when he left I was pretty well sold on what they were trying to do." (Tr. p. 648, lines 18-20.)

It should be noted that the latter statement is ambiguous at best. The phrase "on what they were trying to do" could well have referred to attempts to obtain an election. Furthermore, the term "pretty well sold" is ambivalent and certainly implies less than total conviction. The Trial Examiner also relied on the fact that Cole filled out the reverse side of the card and checked the blocks "contract negotiations" and "legislation." However, Cole testified that this was done *in the event* the Guild became the bargaining agent through an election. (Tr. p. 669.)

From this evidence, it appears that the Trial Examiner concluded that Cole was in favor of the Guild and that any misrepresentations as to the effect and purpose of the card were therefore immaterial. This, however, does not follow. Gillis expressly told Cole to forget the authorization language on the card, and such statement must be given the same effect as though Gillis had physically stricken the authorization language from the card. Thus, no effective authorization exists.

Interestingly enough, the Trial Examiner's acceptance of Cole's card was based on Cole's subjective intent. As has previously been mentioned, courts of appeals have found subjective intent relevant in determining the validity of authorization cards. However, the courts have focused their attention on subjective intent relating to purpose of the card and *not* on the employee's

thoughts as to the merits of the union. With respect to the former, Cole clearly testified that he did in fact believe that the card was "just for an election." (Tr. p. 647.) Thus, it is clear that he was misled by the comments of Gillis and such subjective intent compels the rejection of the card and not its acceptance.

In conclusion, it is submitted that Cole's card should be rejected even if the Court adopts the "only" rule. It is undisputed that Cole was told that the purpose of the card was only for an election and that the authorization language meant nothing. In addition, he was in fact misled by such misrepresentation. *A fortiori,* the card should be rejected under the test adopted by a majority of the courts of appeals.

Donald Erickson

The Trial Examiner made the following findings with respect to Erickson which findings were adopted by the Board:

> "Gillis solicited Erickson's card and told him about the Guild, the possibility of having it represent the employees in collective bargaining with Respondent and the possible benefits they could receive by joining the Guild. He told Erickson that the cards would bring about an election whereby all the employees could vote by secret ballot and determine through the election whether or not they wanted to be represented by the Guild and that he did not want Erickson to commit himself one way or the other at that time regarding his vote. Gillis stated that he wanted to get as many cards signed as he could and that this would show the Company that the employees were united and that they wanted better conditions; and the more cards, the

better. He stated that the cards would all be kept secret, but that the total number would be sent by telegram to the Respondent.[11]"

"[11]Erickson testified he could not say that Gillis told him the card was 'only' for an election, although he said Gillis told him 'that in so many words;' but he testified that by the words used by Gillis he was 'led to believe' the sole purpose of the card was an election."

The exact testimony of Erickson is as follows:

> "THE WITNESS: Well, after he explained what the Guild was and the benefits would come about by bringing the Guild in, he told me that this card would be used along with several others that had been signed to bring about an election, and he did not want me to commit myself one way or the other at that time regarding a vote or anything." (Tr. p. 674, lines 13-18.)

Erickson was not told that the card would be used for any purpose other than for an election. (Tr. p. 675.) In response to the question by the Board's attorney as to whether he was told that the card was only for an election, Erickson stated, "Yes, he told me that in so many words." (Tr. p. 676.)

The Board in its brief relies heavily on the following testimony of Erickson:

> "Q. Did Mr. Gillis mention anything about a 'show of force'?
>
> "A. I think he did. I think he probably used those words.
>
> "Q. Tell us what he said.
>
> "A. Well, he wanted to get as many cards as he could, and this would show the Company that the

employees were united; that they wanted better conditions, and the more cards, the better." (Tr. p. 678, lines 9-15.)

This statement was further explained by Erickson in response to questions by the Board's attorney.

"A. Well, I think I have already said that the effect of the more cards the better and Mr. Curry, the Employer, would know at least a majority or a large number of his employees were interested in bringing about the election or interested in exploring the idea further.

"Q. Or interested in having the Guild represent them?

"A. Or interested in having the Guild represent them." (Tr. p. 679, line 21 — Tr. 680, line 2.)

Construing the last disjunctive phrase most favorably for the Board, the most that can be inferred is that some of the employees who signed cards were "interested" in the Guild. Indeed, it is probably true that employees who want an election are usually somewhat "interested" in the issue that will be voted upon. This does not mean, however, that they have yet made a decision with respect to that issue. This was, in fact, the case with Erickson as shown by the following question and answer:

"Q. So, you decided it would be a good thing, or at least your decision at that time was it would be a good thing to have the Guild represent the employee?

" . . . .

"A. THE WITNESS: Well, I was undecided at that time whether it was good or bad to have the Guild represent the employees, and I didn't know

at that time how I wanted to vote. The whole thing was very new to me. I remember in the back of my mind that I certainly didn't want to commit myself at that time one way or the other for a vote. And when he assured me that the card was to call an election, why, I understood then that I could decide later which way I wanted to vote." (Tr. p. 677, lines 6-8, 17-24.)

It can therefore be seen that Erickson was expressly told by Gillis that the latter did not want Erickson to commit himself one way or another at that time. Erickson was furthermore told by Gillis "in so many words" that the card was only for an election. Although Erickson believed that Respondent would be informed as to the number of cards that had been signed, he was led to believe that this would only demonstrate an interest on the part of the employees.

The foregoing demonstrates that Erickson's card should be rejected even under the Board's "only" rule in that Gillis discounted any commitment on the part of Erickson. In addition, the evidence shows that Erickson was in fact misled by Gillis' misrepresentations.

Certainly, the cards of Cole and Erickson should not be considered in determining majority status either under the Board's rule or under the rule adopted by most of the courts of appeals.

C. Applying the Correct Standard, the Board's Findings of Fact Required That the Authorization Cards Signed by Gray, Rinehart and Baylor Should Also Have Been Rejected.

Although the rejection of the cards of Cole and Erickson would be sufficient to demonstrate that the Guild did not represent a majority, three other cards should also be invalidated under the test approved by most of the courts of appeals. These cards will now be considered.

Randolph Gray

The Board adopted the following findings of fact made by the Trial Examiner with respect to the circumstances under which Gray's authorization card was executed:

> "Gray's authorization card was solicited by Gillis. Gray had been a member of the Guild when employed by another newspaper. Gillis told him that he was trying to get signatures together to bring about an election for representation by the Guild, and that he thought all of the employees at Respondent would be better off with union representation, and he urged Gray to sign a card." (R. 81.)

The foregoing findings render it apparent that Gray was led to believe that he was signing a card only to bring about an election. Gray testified that this was in fact his sole intent in signing the card. (Tr. p. 747.) Indeed, no other purpose had been mentioned. (Tr. p. 741.) The statement on page 35 of the Board's brief that Gray "admittedly read the card and knew that it could be used to obtain representation without an election" is not correct. The relevant testimony is as follows:

> "Q. Didn't he say that if things went as well as they had been going, they would be sitting down at the bargaining table with Mr. Curry?

"A. I believe he showed some optimism, as far as he was concerned in bringing about an election.

"Q. You knew, didn't you, that Mr. Curry could capitulate and could just recognize the union without an election, didn't you know that?

"A. I believe I was aware of that." (Tr. p. 742, line 20 — Tr. p. 743, line 3.)

It is obvious that an employer can capitulate in any election campaign and Gray's answer is a mere acknowledgement of this fact. The crucial issue, however, is the effect of the cards and there is no evidence that Gray was aware that the cards could be used to compel such a capitulation. There is furthermore no evidence that he obtained such knowledge in San Pedro where he was required to be a Guild member under a union shop provision. (Tr. p. 746.)

From the foregoing, it can be seen that Gillis again followed his consistent pattern of creating the impression that the cards would be used only to obtain an election and for no other purpose. This falls squarely within the scope of the conduct condemned by the courts of appeals. Gray's card should therefore be rejected in that he was led to believe by the remarks of Gillis that the only purpose of the card was to have an election.

Richard Baylor

The Board adopted the following findings of fact made by the Trial Examiner with respect to the circumstances under which Richard Baylor executed an authorization card:

"Rinehart solicited Baylor's card and talked to him about the situation at Respondent and stated

that some of the employees had gotten together and decided to see if the Guild could straighten the situation out; he explained that the Guild needed a certain percentage of signatures of the employees in the editorial department in order to file a petition with the Board requesting an election. He asked Baylor to sign and he did." (R. 80.)

The only logical inference which can be drawn from the foregoing finding of fact by the Trial Examiner is that Baylor could reasonably conclude that the purpose of the card was solely to bring about an election. No other purpose was mentioned and Rinehart specifically informed Baylor that a certain percentage of signatures were needed to file the election petition.

On page 37 of its brief, the Board states that "Baylor knew that the card could be used to obtain recognition without an election but could not remember if Rinehart told him so at the time he signed." This statement by the Board incorrectly implies that Baylor knew this fact at the time he signed the card. Baylor, however, testified that he could not remember whether at the time he signed the card he knew that the card could be used to obtain recognition without an election. (Tr. pp. 763-764.)

From the Trial Examiner's finding, it can be seen that Rinehart's remarks were clearly calculated to cause Baylor to believe that his card would be used for an election and for no other purpose. The mere speculation that Baylor *might* have known that cards could be used for recognition should not be controlling in light of the clearly misleading nature of Rinehart's solicitation.

Floyd Rinehart

Rinehart was one of the two key solicitors assigned to solicit authorization cards from the other employees. The following findings of fact made by the Trial Examiner with respect to the circumstances under which Rinehart signed a card were adopted by the Board:

> "Rinehart, who was one of the three employees who first met with Union Representative Schrader and who solicited other employees to sign authorization cards, asked Schrader at the first meeting whether these cards constitute an immediate application to the Guild as dues-paying members. He replied that they were not members at that moment, but that the cards indicate the employees are interested in the Guild and that they want an election; that if the election is successful for the Guild, then the employees who signed would be members." (R. 80)

It is apparent from the foregoing that Schrader intended to give the impression that the cards would be used solely for an election. This is further demonstrated by the following question and answer by Rinehart:

> "Q Did Mr. Schrader say at this meeting that one of the purposes of signing the card was to have the Guild as a collective bargaining representative without an election?
>
> "A I don't recall that, no." (Tr. p. 698, lines 18-21)

It is submitted that the great emphasis placed on an election by Schrader without mentioning any other purpose is sufficient to invalidate the card of Rinehart.

The foregoing clearly demonstrates that the cards of Gray, Baylor and Rinehart should be rejected by the

Court under the standard approved by most of the courts of appeals. As the Guild represented far less than a majority of the editorial employees in an appropriate unit, the bargaining order portions of the Board's order cannot be enforced.

D. The Appropriate Bargaining Unit Consisted of Twenty-Eight Employees

In his decision in the representation proceeding (31-RC-18), the Regional Director determined, contrary to the position of Respondent, that News Editor Johnson, City Editor Berman, and Assistant Editor Palmer were supervisors and were thus excluded from the appropriate editorial department unit. With the exclusion of these three individuals, the bargaining unit consisted of 25 employees. It is the position of Respondent that the Regional Director's exclusions were erroneous and that therefore the appropriate bargaining unit consisted of 28 individuals. As even the Board found that the Guild obtained only 14 valid authorization cards, it is obvious that if the latter unit is correct, the Guild never obtained majority status. In addition, the inclusion in the unit of one of the three excluded individuals and rejection of only one of 14 cards will also demonstrate a lack of majority status.

In reviewing Board determinations as to supervisory status, the standard which should be applied is whether the Board's findings are supported by substantial evidence. *NLRB v. Security Guard Service, Inc.,* 384 F.2d 143 (5th Cir. 1967). Applying this test to the status of Johnson and Berman, this Court should conclude that the finding that Johnson and Berman were supervisors is not supported by substantial evidence. However, it is submitted that under no circumstances can the finding that Palmer was a supervisor be justified on the basis of the substantial evidence test.

Section 2 (11) of the Act sets forth the following detailed and specific definition of "supervisor":

> "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances or, effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The legislative history behind this provision clearly indicates Congressional concern that employees with minor supervisory duties not be excluded from the protections afforded by the Act. This history reveals that the Senate bill with a narrower definition of "supervisor" was ultimately adopted. The intent behind this definition is indicated in the following excerpt from the Senate Committee Report:

> "The committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to such action." (S.Rep. No. 105, 80th Cong. 1st Sess. 4 (1947))

The courts have considered this Congressional intent in construing Section 2 (11) and where employees exercise only minor supervisory duties which do not require the

exercise of substantial independent judgment, they have not been found to be supervisors. *NLRB v. Security Guard Service, Inc.,* 384 F.2d 143 (5th Cir. 1967); *Plastic Workers Union, Local* 18 *v. NLRB,* 369 F.2d 226 (7th Cir. 1966); *Tele-Trip Company v. NLRB,* 340 F.2d 575 (4th Cir. 1965); *NLRB v. Newton Company,* 236 F.2d 438 (5th Cir. 1956); *NLRB v. Parma Water Lifter Company,* 211 F.2d 258 (9th Cir. 1954).

In his decision, the Regional Director gave the following reasons for holding that Palmer was a supervisor: the exercise of authority to assign stories, to reprimand reporters and the use of his own discretion in determining preferences for publishing material. (GC Exh. 1 (d).) The record in both the representation case hearing and the unfair labor practice hearing renders it apparent, however, that Palmer had no authority over reporters and that, therefore, there was no basis for the Regional Director's finding that he exercised the authority to assign stories and reprimand reporters. (RC Tr. pp. 56-57; Tr. pp. 946, 1004.) Palmer's functions at the news desk are comparable to those of wire editor Cole, Sunday editor Ceder and night editor Baylor, all of whom received more compensation than Palmer. (RC Tr. pp. 52-58, 81-83.)

The evidence offered by employee witnesses does not support the contention of the Guild that Palmer is a supervisor. Baylor testified that during the six weeks between Palmer's appointment to the newly created position of assistant news editor and the hearing Palmer had reprimanded Baylor with respect to a sloppy work area by memos to the effect — "shape up, or else." (RC Tr. p. 312.) There is no evidence in the record that Palmer had the authority to issue such warnings. (RC Tr. p. 144.) In any event the imposition of such minor disci-

pline is not indicative of supervisory authority. *Crumley Hotel, Inc.,* 134 NLRB 113, 117 (1961); *West Virginia Pulp and Paper Company,* 122 NLRB 738 (1958). Baylor also testified that Palmer determined preferences for publishing material but it is apparent that despite Baylor's effort to exaggerate Palmer's authority in view of his disappointment over Palmer's receiving the title of assistant news editor, Palmer's authority to screen controversial material and other duties was comparable to those of Baylor, Cole and Ceder. (RC Tr. pp. 47-58, 400-403; Tr. p. 1005.) Geittmann indicated that she sometimes lobbies her stories with Palmer but conceded that this was when he was in the slot and she would lobby her stories with whoever was in the slot at a particular time. (RC Tr. pp. 282, 297.)

Reviewing the foregoing facts with earlier Board decisions involving supervisory status in the newspaper industry, it is apparent that the Regional Director's decision did not follow earlier Board decisions. The direction and assignment of work performed by Palmer have been consistently regarded as routine and employees performing such functions have been included in editorial department units. *Dow Jones & Company, Inc.,* 142 NLRB 421 (1963); *The Peoria Journal-Star, Inc.,* 117 NLRB 708 (1957); *Greensboro News Company, Inc.,* 85 NLRB 54 (1949).

Although there may be a stronger argument to support the contention that Johnson and Berman are supervisors, the record in the representation case and the unfair labor practice case demonstrate that although these employees engage in routine direction and coordination of work, they do not possess the genuine prerogatives of a supervisor. Neither Johnson nor Palmer have the authority to discharge, hire, adjust grievances, promote

or recommend wage increases. In fact, the only persons in the editorial department with knowledge of the salaries of the other employees in that department are executive editor Stewart and managing editor Moon. (RC Tr. p. 44.) The only basis, therefore, on which Johnson or Berman could be regarded as supervisors is due to their assignment or direction of work of others.

Johnson's assignment or direction of work is limited to the news desk employees and primarily to times when Johnson was functioning as "slot man" during the two or three hours each day when the principal edition of the newspaper is prepared at the news desk. (Tr. p. 947) Four other news desk employees also regularly function as slot man. (Tr. p. 1103)

Berman's role as city editor is primarily to coordinate assignments of reporters. Reporters are permanently assigned by Moon to permanent geographical and subject beats. (RC Tr. pp. 12, 13, 65, 201, 202) Assignments by the city editor are made on the basis of permanent assignments unless the permanent reporter is not available, in which case the assignment is made on availability with Moon being consulted in the event any question arises as to availability. Moreover, Berman receives $10 per week less than one of the employees he allegedly supervises. (RC Tr. pp. 81-82)

Accordingly, the Court should find that the appropriate unit consists of 28 employees and that the Guild was not authorized as collective bargaining agent as of April 26, 1965 or any subsequent date.

The Board, however, contends that this Court is precluded from reviewing the determination of the Regional Director as to the supervisory status of Johnson, Berman, and Palmer. In the unfair labor practice proceedings, Respondent did attempt to prove that these

individuals were not supervisors. The Trial Examiner, however, with the approval of the Board, refused to permit such relitigation on the grounds that a party may not relitigate in an unfair labor practice proceeding what was or could have been litigated in a prior representation proceeding. In so doing, he relied on Section 102.67(f) of the Board's Rules and Regulations, which provides in part as follows:

> ". . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Respondent contended and still contends that this provision is to be applied only in a related unfair labor practice proceeding where an employer is attempting to seek judicial review of a certification by refusing to bargain with the certified union. In such a case, the employer deliberately commits a technical unfair labor practice simply as a means of obtaining judicial review of an otherwise unreviewable representation proceeding. The employer in that situation is obviously concerned about judicial review, not review by the Board, and it is thus a waste of administrative effort for the Board to decide the same issues again in the unfair labor practice proceeding. In such a context, precluding relitigation is sensible. Outside this narrow exception, the charged party should in all fairness be entitled to a Board ruling or redetermination on a bargaining unit question such as supervisory status, which arises in the context of an unfair labor practice proceeding and which is crucial to the

resolution of the unfair labor practice question. See *Heights Funeral Home, Inc. v. NLRB,* 385 F.2d 879 (5th Cir. 1967); *Amalgamated Clothing Workers of America v. NLRB,* 365 F.2d 898 (D.C. Cir. 1966).

The Board in its brief nevertheless contends that Section 102.67 applies to other types of unfair labor practice proceedings such as the one in the instant case. The Board's sole rationale for this conclusion, as stated on page 26 of its brief, is as follows:

> ". . . However, since the issue has already been litigated in the representation case, and since the Board's bargaining order is based in part upon the resolution of this issue, making that determination reviewable in the court of appeals (Section 9(d)), there is no reason to allow the same issue to be litigated again, on the same evidence for the same purpose."

In short, the Board's rationale is premised on the *availability of judicial review.*

After concluding that the Respondent could not relitigate supervisory status in the unfair labor practice proceeding before the Board because of the availability of subsequent judicial review, the Board then makes the bold-faced argument in its brief that Respondent is precluded from seeking judicial review in the instant case. The two contentions are obviously inconsistent and the Board cannot prevail on both. Either Respondent is entitled to relitigate supervisory status before the Board, or if not, it is entitled to judicial review.

Even aside from this inconsistency, the Board's arguments for precluding judicial review are clearly without merit. The Board's brief states that Section 10(e) of the Act precludes review. This Section provides in part as follows:

> ". . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

In the instant case, Respondent *did* attempt to raise its objections as to supervisory status before the Board in the unfair labor practice proceedings but the Board refused to entertain such objections. Certainly, the Board may not refuse to consider an issue and then accuse Respondent of not raising it.

The Board is forced to fall back on the argument that Respondent is precluded from seeking judicial review because of its failure to request review of the Regional Director's final decision in the earlier representation proceedings. Here, again, the Board's reasoning is totally inconsistent. On the one hand, the Board argues that Respondent refused to recognize the Guild in order to gain time to dissipate the alleged majority, and on the other hand, the Board argues that the Respondent should have filed a request for review thus delaying the date of the election. The Board's argument also fails to recognize that employers may forego time-consuming review procedures in order to avoid such election delays. In light of the general time lag between the filing of an election petition and the holding of an election and the Board's repeated concern over such a time lag, it is submitted that failure to seek such review is often commendable. Such an employer should not, however, be thereafter penalized and precluded from judicial review when such representation issues become crucial issues in a subsequent unfair labor practice proceeding.

In considering the failure to request review, it is also essential to note the power of the Board's regional directors in representation cases. Under Section 3(b) of

the Act, as amended in 1959, the Board was authorized to delegate to its regional directors its powers under Section 9 to decide representation cases. Section 3(b) provides in part as follows:

> "The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such review will not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director."

Pursuant to this Section, the Board has delegated its powers in representation cases to the regional directors, except where the parties have mutually agreed to enter into a "stipulation for certification upon consent election." In the latter case, the regional directors makes only a recommended decision and the final decision is made by the Board. In all other cases, including a "directed election" as occurred in the instant case, the regional director makes the final decision.

Section 3(b) does provide for a type of discretionary review of such final decisions. However, the review is not automatic and is granted by the Board only in a very limited number of cases. The failure to utilize such a discretionary and seldom granted review of a final representation decision should not preclude judicial review of a crucial issue in a subsequent unfair labor practice

proceeding. In the instant case, the decisions cited by the Board do not involve failures to file requests for review but rather involve failure to appeal decisions which were *not* final and for which a *de novo* appeal to the Board existed. Thus, in *NLRB v. Rexall Chemical Co.*, 370 F.2d 363 (1st Cir. 1967), the employer failed to appeal the regional director's recommendations in a "stipulation for certification upon consent election." In the other cited cases, the respondent failed to appeal the non-final trial examiner's decision in an unfair labor practice proceeding.

Lastly, it should be noted that the novel contention advanced by the Board is inconsistent with its own rules. In Section 102.67(f) previously quoted, the Board provides that failure to request review shall preclude relitigation in related subsequent unfair labor practice proceedings, and then in the very next sentence of the Section, the Board provides that denial of a request for review will have exactly the same effect. In short, under the Board's own rules, the result would be the same even if Respondent had requested review in the representation proceeding. In light of these provisions, it is submitted that the litigant is not given sufficient notice that the failure to seek review would have the grave consequences urged by the Board in the instant case.

In conclusion, it can be seen that Johnson, Berman, and Palmer should be included in the appropriate bargaining unit and that the Guild did not represent a majority in such appropriate unit. Respondent furthermore is not precluded from seeking judicial review of such a unit question. Respondent was apparently precluded from relitigating the question of supervisory status before the Board on the rationale that judicial review was subsequently available, and it is submitted that Respondent therefore should now have the right to such judi-

cial review. The Board's rules cannot be used as a justification for refusing review as it is clear that the effect of filing or not filing a request for review is exactly the same. Lastly, the Regional Director had the power, delegated by the Board, to make and did make a final unit decision and such final decision is reviewable by the Court in a subsequent unfair labor practice proceeding.

II. THE BOARD ERRED IN QUASHING THE SUBPOENA FOR THE PRODUCTION OF THE PREHEARING STATEMENTS WHICH WERE GIVEN TO THE GENERAL COUNSEL BY THOSE EMPLOYEES WHO SIGNED AUTHORIZATION CARDS AND WHICH RELATED TO THE CIRCUMSTANCES UNDER WHICH SUCH CARDS WERE SIGNED EVEN THOUGH SUCH EMPLOYEES WERE NOT CALLED AS WITNESSES BY THE GENERAL COUNSEL.

During the hearing Respondent served a subpoena duces tecum upon the General Counsel and his duly designated representatives Paul A. Cassady, Regional Director of Region 31, and Anthony F. Sauber, trial counsel, directing that they produce any statements in their possession relating to the circumstances surrounding the execution of nine authorization cards signed by employees of Respondent and introduced into evidence by the General Counsel. (Tr. Exam. Exh. 1.) Respondent's position was that since these authorization cards were being relied upon as evidence of the Guild's majority status, Respondent was entitled to examine any statements obtained by the Board relating to the circumstances under which such cards were executed for the purpose of determining the validity of the cards.

The Trial Examiner granted the General Counsel's motion to quash on the grounds that two requirements of

Section 102.118 of the Board's Rules and Regulations had not been met: the consent of the General Counsel to the production of the records had not been obtained (Tr. Exam. Exh. 3) and the employees whose statements were sought had not been called as witnesses by the General Counsel. It is submitted that this ruling was incorrect in that it contravened the rules of law relating to the production of statements during federal administrative hearings.

First, it should be noted that the Trial Examiner based his decision entirely upon Section 102.118 without questioning the relevancy or admissibility in other respects of the statements sought by Respondent. The law in this Circuit, as established in *General Engineering Inc. v. NLRB,* 341 F.2d 367 (9th Cir. 1965), is that documents in the possession of the Board cannot be withheld solely on the basis of Section 102.118 but rather the refusal to produce such documents must be based upon a recognized rule of evidence. As the Trial Examiner made no attempt to base his ruling on grounds other than Section 102.118, it is clear that his ruling was erroneous.

Secondly, the *Jencks* rule provides that in all public proceedings undertaken on behalf of the Government to enforce a public act, the Government may not rely upon a witness's testimony and then deny the Respondent access to statements of the witness which may impeach that testimony. *Jencks v. United States,* 353 U.S. 657 (1957). In the instant case the introduction of the authorization cards to prove majority status was tantamount to the signers of the cards testifying in person. Respondent therefore should have been permitted, under the *Jencks* rule, to examine the statements in the Board's possession relating to the circumstances under which the cards were executed. Indeed, the Ninth Circuit has held that the Board cannot impose its own limitations on the

Jencks doctrine and to the extent the limitations contained in Section 102.118 contravene the doctrine, they must be disregarded. *Harvey Aluminum v. NLRB,* 335 F.2d 749 (9th Cir. 1964). Therefore, to the extent that Section 102.118 is being applied in this case to prevent production of statements because the General Counsel's consent has not been obtained and the employees involved have not been physically called to testify by the General Counsel, it must be disregarded because under the *Jencks* rule the cards are the equivalent of oral testimony and the consent of the General Counsel is not required.

The Court should also be mindful that the refusal to allow examination of such statements could render it impossible for a respondent in cases of this type to fully obtain the facts relating to the execution of authorization cards. For example, the Board could administratively determine that certain misleading statements were not sufficient to invalidate the card and then introduce the card without producing the signer as a witness. Under the General Counsel's theory, neither the respondent nor the trier of fact would have the opportunity to consider a statement which might cast serious doubt on the validity of the card.

The Trial Examiner's suggestion that Respondent could call the employees as witnesses is clearly insufficient. If Respondent did call such employees as witnesses, it would not by that fact be entitled to their prior statements. Moreover, it might be impractical for the Respondent to call employees who have left the Los Angeles area. Finally, when Respondent does call witnesses who have given prior statements, the General Counsel argues, as he has done here, that their testimony is nine months old, influenced by threats, and should be disregarded. While thus attacking the credibility of the employees

and referring to a "morass of hazy. . . recollections," he continues to withhold statements in his possession given shortly after the election.

On the basis of the foregoing, it is submitted that if this Court determines the findings in this case support the Board's conclusion that the Guild was designated as bargaining representative by a majority of Respondent's editorial employees, then at the very least the case should be remanded to the Board with instructions that the order granting the motion to quash the subpoena duces tecum be vacated, the hearing reopened, and any statements by Butkus, Rinehart, Ceder, Baylor, Cole, Saenz, Gray, Erickson or Morrow relating to the execution of the cards be submitted to Respondent for review.

III. THE BOARD ERRED IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF GENERAL COUNSEL'S EXHIBIT NO. 18 WHICH WAS OBTAINED BY THEFT.

General Counsel's Exhibit No. 18 is a private memorandum prepared by employee Johnson for publisher Curry. Employee Gillis stole a copy of this memorandum from city editor Berman's desk drawer, copied it, and delivered the copy to Loel Schrader, international representative for the Guild. Schrader in turn delivered the document to the General Counsel, who then offered it in evidence. (Tr. pp. 93-95.)

That Exhibit No. 18 was critical in the Trial Examiner's findings of fact is clearly evident from his decision. He specifically relied on the memorandum in finding the following violations: (1) the alleged "slip of paper" promise to Hall (R. 71, lines 52-65); (2) all other violations alleged against Johnson (R. 72, lines 59-62, 64-65); (3) that the alleged statements by Wahlheim and Curry

constituted a threat that working rules would be administered heartlessly and vindictively (R. 76, lines 33-37); and (4) that the wage increase effective June 28 and July 1, 1965, violated the Act (R. 84, lines 19-29). Moreover, the Trial Examiner obviously considered this evidence in resolving all of the credibility issues against Respondent's witnesses in connection with the Section 8(a)(1) allegations. These uses of the evidence demonstrate its critical importance in the Trial Examiner's findings and the Board's decision; the information in the memorandum is not, as Petitioner suggests, "merely cumulative." (Brief for Petitioner, p. 21, n. 15.)

Gillis admitted that he had taken the memorandum from Berman's desk without permission. (Tr. p. 93.) According to Schrader, the Guild's international representative, Gillis had been one of the union's representatives during the course of the election campaign period. (Tr. p. 50.) The Trial Examiner found that Gillis and another employee had been key solicitors of authorization cards on behalf of the Guild. (R. 68, lines 59-60.) It is clear, therefore, that in stealing the memorandum Gillis acted as the Guild's agent.

Respondent contends that the memorandum should have been excluded for two reasons. First, admission of this evidence conflicts with announced policies of the Act. Second, the Johnson-Curry memorandum was obtained in violation of the Fourth Amendment. These contentions will now be considered.

A. Admitting Evidence Illegally Obtained by a Labor Union Subverts National Labor Policy, and an Order Based Upon Such Evidence Should Therefore Not Be Enforced.

In the preambles to the Act, Congress stated its reasons for enacting this legislation. Section 1(b) of the Act contains this statement of policy:

> "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." (29 U.S.C. §141 (1964).)

This and other provisions of the preamble demonstrate that industrial peace was Congress' main object. The statutes removed labor disputes from the streets and created a fair, peaceful method of settling them. For this method to work, however, Congress recognized that "employers, employees, and labor organizations [must] each recognize under law one another's legitimate rights in their relations with each other." If either party is permitted to ignore these rights, the system becomes unjust and peaceful methods break down.

Indispensable to any peaceful, just system of settling disputes is a rule that fair not foul means be used in preparation for the proceedings. A party to a labor proceeding has a legitimate right to expect that his opposition will employ only lawful devices in preparing its case. And if this right is to have value, the Board and the courts must protect it. Respondent submits that to implement this right and to discourage its violation, this Court should hold that evidence obtained illegally by either party to a labor dispute is inadmissible in Board proceedings.

It is easy to foresee the consequences of condoning the use of illegally obtained evidence in Board proceedings as proof of unfair labor practices. Employers victimized

by unlawful searches may feel that they too can obtain evidence of a union's unlawful activities by stealing it from union offices or by detaining and searching union members. The value of evidence to be obtained by these methods would in many cases make the risk worth taking. Moreover, a decision for Petitioner will embolden some unions to risk minor criminal penalties in order to obtain evidence damaging to an employer. One must realize that the stakes in labor disputes are often high and the desire for victory intense. Modern tools of industrial espionage — far more sophisticated than simple theft — are available to both sides. These consequences of a decision for Petitioner cannot be dismissed merely as the *reductio ad absurdum* of his arguments: To parties who are so often adversaries, the possibilities are real indeed.

The Board itself has recognized that using illegally obtained evidence in its proceedings conflicts with national labor policy. In *Hoosier-Cardinal Corporation,* 67 NLRB 49 (1946), the secretary-treasurer of a company union was secretly an active member of a labor organization that sought to become the bargaining representative. Through his office the secretary acquired the company union's records. A union organizer contacted the Board's regional office, advising its representative that the secretary would permit agents to see them. As a result a Board agent visited the secretary's home, made copies of the records and returned the originals to the secretary. Thereafter the Board subpoenaed officers of the company union to produce these documents. The employer objected to this evidence on the ground that it was obtained in contravention of the Fourth Amendment. Upon review, the Board refused to pass on the constitutional question, but decided unanimously to reject evidence obtained through these methods:

"Without passing upon the question, therefore, as to whether any constitutional rights were invaded, we have unanimously decided to overrule the Trial Examiner and reject the evidence obtained through the methods already described. Even where, as here, we do not question the integrity or motives of our agents, we prefer not to rely upon evidence obtained by such methods. It is better that there be a failure to take full advantage of such dubious opportunities than that Government, which 'teaches the whole people by its example, * * * should play an ignoble part.' As an administrative agency having both investigating and judicial duties, this Board must exact the highest standards of conduct from its investigating officers. Congress has vested this Board with authority to issue subpoenas, and has provided a means for enforcing them judicially when they are not complied with. It seems to us that, under these circumstances, the Board agents should have used the methods prescribed by the statute. . . ." (67 NLRB at 55.)

Thus without reaching the constitutional question, the Board in *Hoosier-Cardinal* decided that excluding unlawfully obtained evidence from its proceedings advanced the policies of industrial peace embodied in the Act.

The only distinction between this case and *Hoosier-Cardinal* is that the Board agent in *Hoosier-Cardinal* photographed the documents before he used them; in this case, the General Counsel simply introduced Gillis's copy of the Johnson-Curry memorandum into evidence. This is a distinction without a difference. In *Hoosier-Cardinal,* Board agents neither initiated the acquisition of the evidence nor participated in the actual taking of the documents. The relevant involvement of the government was therefore as great as that admitted by Peti-

tioner in this case: The investigative arm of the Board was the beneficiary of an illegal seizure of documents by a union member.

Hoosier-Cardinal reflects the Board's own view of the relationship of illegally obtained evidence to the manifest policies of the Act. The opinions below in this case do not suggest that this view has changed: Although Respondent presented the question, the Trial Examiner and the Board did not consider it.

It is well settled that the Courts of Appeals should not enforce the Board's orders mechanically. The power of enforcement is equitable in nature, and this Court may consider whether the relief sought is inconsistent with principles of equity. *NLRB v. National Biscuit Co.,* 185 F.2d 123, 124 (3d Cir. 1950); *NLRB v. Eanet,* 179 F.2d 15, 20-21 (D.C. Cir. 1949). It is also clear that Section 10(e) grants courts of appeals discretion to consider whether enforcement of a Board order is consistent with the purposes of the Act. *NLRB v. Brown Lumber Co.,* 336 F.2d 641 (6th Cir. 1964); *NLRB v. Kingston Cake Co.,* 206 F.2d 604 (3d Cir. 1953); *NLRB v. Globe Automatic Sprinkler Co.,* 199 F.2d 64 (3d Cir. 1952). The Third Circuit has recognized that ". . . A court of appeals has some responsibility for the effects of its own decree; this is especially so where it appears that enforcement would entail subversion, rather than effectuation of the legislative purpose." *NLRB v. Kingston Cake Co.,* 206 F.2d 604, 611 (3d Cir. 1953) (Staley, J.). And as Professor Jaffe has stated, "A court should rarely be required — nor should it be thought that there is any intention to require it — to participate actively in the enforcement of a judgment which it finds offensive." Jaffe, *The Judicial Enforcement of Administrative Orders,* 76 Harv. L. Rev. 865, 869 (1963).

Petitioner in this case seeks to enforce a Board order grounded in evidence obtained by a union member's theft. As has previously been demonstrated, this method of acquiring evidence subverts the national labor policies articulated by Congress. Respondent therefore requests this Court for that reason to exercise its equitable discretion and refuse to enforce the Board's order.

B. General Counsel's Exhibit No. 18 Was Obtained In Violation of the Fourth Amendment, and the Board Therefore Erred in Admitting This Document Into Evidence.

Burdeau v. McDowell, 256 U.S. 465 (1921), held that evidence illegally acquired by private individuals was admissible in federal court. Petitioner has cited this case as controlling authority for the admissibility of General Counsel's Exhibit No. 18. In the 47 years since the Supreme Court decided that case, however, the law of search and seizure has changed significantly. Subsequent cases have weakened its authority and shaken its foundations in constitutional policy. Its narrow holding is inapplicable to the facts of this case.

1. As a part of the "Silver Platter" Doctrine, Burdeau v. McDowell was overruled by implication in Elkins v. United States.

In 1914 the Supreme Court held in *Weeks v. United States,* 232 U.S. 383 (1914), that evidence acquired by federal agents in violation of the Fourth Amendment was inadmissible in federal court. However, the Court also stated that the Fourth Amendment was not directed at misconduct of state officials, 232 U.S. at 398, and that evidence obtained through an unreasonable search and seizure by state authorities without knowledge or cooperation of federal officers was admissible in a federal

court. Mr. Justice Frankfurter in *Lustig v. United States,* 338 U.S. 74, 79 (1949), dubbed this holding the "silver platter" doctrine.

The rule of *Burdeau v. McDowell* was a part of the silver platter doctrine. Though federal courts could not admit evidence acquired by federal officers in violation of the Fourth Amendment, evidence obtained by private individuals and presented to federal officers on a silver platter was admissible under the rule of *Burdeau v. McDowell.* In 1960 the Supreme Court overturned the silver platter doctrine, holding in *Elkins v. United States,* 364 U.S. 206 (1960), that federal courts could not admit evidence unconstitutionally obtained by state officials. When that case was decided, however, state courts were not obliged to exclude illegally obtained evidence. *Elkins* therefore required federal courts to suppress illegally obtained evidence even though the officers who seized it were themselves not the objects of the exclusionary rule. The Court reached this conclusion because the silver platter doctrine was inimical to the rights of privacy protected by the Fourth Amendment: It encouraged federal officers to use subterfuge to accomplish ends otherwise unlawful.

The silver platter doctrine of *Burdeau v. McDowell* is no less pernicious. If evidence obtained illegally by private individuals is admissible in federal proceedings, federal officers are encouraged to use artifice and manipulation to acquire proof of facts. These same infirmities accompanied the silver platter doctrine which the Supreme Court rejected expressly in *Elkins v. United States.* It is inescapable, therefore, that Elkins also overruled *Burdeau v. McDowell* by implication.

The Court of Appeals for the Sixth Circuit agrees with this conclusion. In *United States v. Williams,* 314

F.2d 795 (6th Cir. 1963), a district court had held certain evidence admissible. While appeal was pending the Supreme Court announced its decision in *Elkins v. United States.* The Sixth Circuit interpreted *Elkins* as a change in the rules of both *Weeks v. United States* and *Burdeau v. McDowell,* and because the district court had relied on both holdings the case was remanded. *Williams v. United States,* 282 F.2d 940 (6th Cir. 1960). According to the Sixth Circuit, therefore, *Elkins* weakened the bases of *Burdeau v. McDowell* in constitutional policy. Though other courts may have disagreed with this view, Respondent submits that the view of the Sixth Circuit is the correct interpretation of *Elkins.*

2. General Counsel's acceptance of the Johnson-Curry memorandum constitutes sufficient federal involvement in Gillis's theft for the exclusionary rule to be applied.

It is settled law that when a government official assists or induces illegal searches and seizures, federal courts must suppress evidence thus obtained. *Byars v. United States,* 273 U.S. 28 (1927). Active participation in the illegal search and seizure by federal officers is not necessary. In *Moody v. United States,* 163 A.2d 137 (D.C. Munic.Ct.App. 1960), a police officer learned that a theft victim had recognized his goods in defendant's apartment. The officer accompanied the victim to the apartment and waited in the hallway while the victim recovered his goods. The court held that the arresting officer had participated in the search even though his role was entirely passive. In *Gambino v. United States,* 275 U.S. 310 (1927), state troopers discovered liquor in defendant's automobile. Indicted in federal court for violation of the National Prohibition Act, defendant moved to suppress the evidence because the search had

been conducted in violation of the Fourth Amendment. At the time this case was decided, of course, the silver platter doctrine was accepted law. Although the Supreme Court found that the state troopers were not agents of the federal government, it held the evidence inadmissible because of the troopers' relation to the federal prosecution. Their purpose in searching the car was to aid the federal prosecution, and federal officials accepted and acted upon the aid. The Court said:

> "The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States." (275 U.S. at 316-317).

Respondent does not suggest that Board agents participated actively in Gillis's illegal seizure of the Johnson-Curry memorandum. But just as the federal authorities in *Gambino* ratified the illegal state arrest by instituting the prosecution, so the General Counsel ratified — and became implicated in — Gillis's theft by accepting and using the memorandum. Because of this federal involvement in the theft, the Board should have applied the exclusionary rule and suppressed General Counsel's Exhibit No. 18. There is no significant difference between cases where officials passively assist illegal activity, or become the beneficiaries of the illegal efforts of state police officers, and this case. Here, the General Counsel was the direct beneficiary of a theft committed by a Guild agent. The Constitutional guarantees of privacy and personal freedom require this Court to deny the prosecutorial arm of the Board the opportunity to profit by such action. As Justice Brandeis said, dissenting in *Burdeau v. McDowell,* 256 U.S. 465, 477 (1921), "Respect for law will not be advanced by resort, in its enforce-

ment, to means which shock the common man's sense of decency and fair play."

That unfair labor practice hearings are quasi-civil in nature does not change this result. Because the Board may impose serious sanctions for violation of the provisions of the Act, its actions are similar to criminal proceedings. Nothing in the Fourth Amendment suggests that its provisions are limited to criminal cases, and the Supreme Court has never so held. See *Boyd v. United States,* 116 U.S. 616 (1886); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965). In 1967 the Court held that warrantless searches by health officials, though civil not criminal in nature, violated the Fourth Amendment. *Camara v. Municipal Court,* 387 U.S. 523 (1967). The Fifth Circuit has stated flatly that the Board must apply the exclusionary rule:

> "If the Board should base its findings solely upon evidence obtained by an unconstitutional search, the order resting thereon would be invalid, because such evidence is incompetent." (*NLRB v. Bell Oil & Gas Co.,* 98 F.2d 870, 871 (5th Cir. 1938).)

3. The Essential Policy of the Exclusionary Rule Is Served When Evidence Illegally Obtained By a Labor Union Is Excluded.

The Supreme Court enunciated the purpose of the exclusionary rule in *Elkins v. United States*:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." (364 U.S. 206, 217 (1960).)

Obviously, applying the exclusionary rule will not serve the purpose of deterrence if the person who commits the

illegal search is not deterrable. This Court should therefore consider whether a labor union is an entity likely to be deterred from conducting illegal searches and seizures by the exclusionary rule.

To this inquiry three factors are relevant. First, the effectiveness of the exclusionary rule depends on the searcher's awareness of the law. If persons committing or directing a search and seizure are unaware of the law governing their actions, it is futile to expect that they will be deterred by the exclusionary rule. Second, the rule's effectiveness depends on the searcher's desire that the items he obtains be used in administrative or judicial proceedings, for if he has no interest that they be introduced as evidence, the disposition of the case will not deter him in the future. Finally, this Court should consider the effectiveness of other remedies available to the victim of an illegal search and seizure. If other remedies adequately deter these activities, evidence obtained through illegal means might be deemed admissible. Respondent contends that an examination of these factors requires that evidence obtained illegally by labor unions in an election proceeding be excluded.

First, most matters concerning labor-management relations are subjected to judicial scrutiny, and unions are advised by competent legal counsel. One can therefore expect that labor unions are aware of the law governing their actions. This awareness can be transmitted easily to the membership. Instead of frustrating federal policy against unwarranted intrusions of privacy, labor unions can help enforce it by discouraging their members from using illegal means to obtain evidence for proceedings against their employers.

Second, labor unions engaged in election proceedings strongly desire that evidence they obtain be used in administrative proceedings to prove unfair labor prac-

tices. Thus it is important to them that their evidence be admissible before the Board, and the possibility that it would be excluded would deter unions from acquiring it illegally.

Finally, remedies other than the exclusionary rule are ineffective in preventing unions from employing unlawful means to obtain evidence. A criminal prosecution of union member Gillis, for example, would have little deterrent effect on the Guild itself. Knowing that if relevant evidence could be obtained through theft, a union might induce a member to risk minor criminal penalties in order to get it. By removing the incentive to obtain the evidence, this Court would provide an effective, practical remedy to victims of a criminal, unconstitutional breach of privacy. This same ineffectiveness of other remedies drove the California Supreme Court in *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 (1955), to adopt the exclusionary rule.

In conclusion, it is submitted that by admitting evidence illegally acquired by labor unions, the Board — and this Court — would "participate in, and in effect condone," *Id.* at 445, 282 P.2d at 911-12, the lawless activities of union members. No remedy other than the exclusionary rule will stop it. But by requiring the Board to exclude such evidence, this Court will secure compliance with Fourth Amendment guarantees and raise Board practice to its rightful position as a constitutional, peaceful, and just method of settling labor disputes. Excluding evidence illegally obtained by labor unions from Board proceedings will rid the Board of the dirty business exemplified by the facts of this case. Respondent respectfully submits that this Court hold that General Counsel's Exhibit No. 18 was obtained in violation of the Fourth Amendment and that the Board erred in admitting it into evidence.

CONCLUSION

On the basis of the foregoing, enforcement of the bargaining order portion of the Board's order against Respondent should be denied and with respect to the other portions of the order the proceeding should be remanded to the Board for a new hearing.

Respectfully submitted,

O'Melveny & Myers
Charles G. Bakaly, Jr.
Peter M. Anderson
Stanley H. Williams

Attorneys for Respondent

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

PETER M. ANDERSON